No. 98-1828

In the Supreme Court of the United States

STATE OF VERMONT AGENCY OF NATURAL RESOURCES,
PETITIONER

v.

UNITED STATES OF AMERICA, EX REL.
JONATHAN STEVENS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Does a private person have standing under Article III to litigate claims of fraud upon the government?

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES

Congress enacted the False Claims Act (FCA) in order to serve the fundamental *national* interest in deterring and redressing acts of fraud against the federal government. "[A]ny person" who knowingly submits a false claim to the government is liable to the United States for treble damages and civil penalties, 31 U.S.C. 3729(a), and the Attorney General is authorized to bring suit against such a person to enforce that liability, 31 U.S.C. 3730(a). Congress also concluded, however, that the FCA's public purposes could be more fully vindicated by giving private persons a concrete financial incentive to sue in the name of the United States to enforce the liability to the United States that is prescribed by Section 3729(a). See 31 U.S.C. 3730(b). The Act's *qui tam* provisions were

> passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain.

Hughes Aircraft Co. v. *United States ex rel. Schumer*, 520 U.S. 939, 949 (1997) (quoting *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 541 n.5 (1943)). Adjudication of *qui tam* suits by the federal courts is fully consistent both with the Framers' conception of the proper judicial role, and with the values that Article III's limitations on the judicial power are intended to protect.[1]

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[1] In 1989, the Department of Justice's Office of Legal Counsel (OLC) took the position that the FCA's *qui tam* provisions are unconstitutional because (*inter alia*) they violate the requirements of Article III. See *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. Off. Legal Counsel 207, 224-228 (1989). As we have previously explained, the OLC memorandum was an internal recommendation to the Attorney General rather than a formal OLC opinion, and it has never

1. a. Article III, Section 2 of the Constitution provides, *inter alia*, that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority," as well as to "Controversies to which the United States shall be a Party." In so defining the constitutional jurisdiction of the federal courts, the Framers sought to incorporate, rather than to change, an existing conception of the "judicial Power." As then-Representative John Marshall explained in 1800, "[a] case in law or equity was a term well understood, and of limited signification. It was a controversy between parties which had taken a shape for judicial decision." Speech of March 7, 1800, in 4 *The Papers of John Marshall* 95 (C.T. Cullen ed. 1984) (*reprinted in* 18 U.S. (5 Wheat.) App. 3, 16) (*Marshall Speech*). "By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs." *Muskrat* v. *United States*, 219 U.S. 346, 357 (1911). This Court recently reconfirmed that Article III's use of the terms "Cases" and "Controversies" is properly understood to "mean cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 102 (1998); accord *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) ("'[t]he judicial Power

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reflected the official position of the Department of Justice. See 95-1340 U.S. Amicus Br. (on Pet. for Writ of Cert.) at 16 n.10 *Hughes Aircraft*, *supra*. In *Hughes Aircraft*, the government argued (see Amicus Br. on Pet. for Cert. at 16-20) that the *qui tam* provisions are consistent with Article III and are otherwise constitutional, and the Court declined to grant certiorari on the petitioner's constitutional claim. See 519 U.S. 926 (1996) (limiting grant of certiorari).

of the United States' * * * must be deemed to be the judicial power as understood by our common-law tradition.").

Qui tam suits fall well within "traditional" conceptions of the "judicial Power":

> Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government. The right to recover the penalty or forfeiture granted by statute is frequently given to the first common informer who brings the action, although he has no interest in the matter whatever except as such informer.

Marvin v. *Trout*, 199 U.S. 212, 225 (1905).[2] Blackstone regarded such actions as a common mechanism by which statutory forfeitures would be collected: he explained that "more usually, these forfeitures created by statute are given at large, to any common informer; or, in other words, to any such person or persons as will sue for the same." 3 William Blackstone, *Commentaries on the Laws of England* *160 (see U.S. Br. 3 n.1). Because the *qui tam* suit was an established mechanism for collecting statutory penalties and for-

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[2] *Marvin* involved a *qui tam* suit brought in state court under an Ohio statute providing for recovery, through an informer action, of money lost in illegal gambling activities. See 199 U.S. at 213-215. The Court considered and rejected the suggestion that the statute violated the Due Process Clause of the Fourteenth Amendment insofar as it authorized suit by a plaintiff other than the person who had lost the money. *Id.* at 224-225. The Court explained that to strike down the law on that basis "would be in effect to hold invalid all legislation providing for proceedings in the nature of *qui tam* actions." *Id.* at 225. The thrust of the *Marvin* Court's analysis was that a mode of procedure so deeply rooted in historical practice as the *qui tam* mechanism could not plausibly be thought to violate the Due Process Clause. That reasoning applies equally to the question whether a *qui tam* suit is a "Case[]" or "Controvers[y]" appropriately subject to the federal "judicial Power."

feitures at (and before) the time the Constitution was ratified, such an action is properly regarded as a "Case[]" or "Controvers[y]" within the meaning of Article III.

b. That *qui tam* suits fall within the federal "judicial Power" is further demonstrated by the actions of the First Congress, which repeatedly authorized informers to file suit to collect all or part of the penalties or forfeitures established by statute. See U.S. Br. 35 & n.22; Resp. Br. 28 & n.7; Taxpayers Against Fraud Amicus Br. 13-14 & n.16.[3] Legislation "passed by the First Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, * * * is contemporaneous and weighty evidence of its true meaning." *Wisconsin* v. *Pelican*

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[3] At least five statutes enacted by the First Congress hewed closely to the model described by Blackstone: *i.e.*, they provided for an equal division of any recovery between the informer and the government; unmistakably authorized the informer to file his own suit; and placed no restrictions on the class of persons who could serve as relators. See Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. 102 (census); Act of July 5, 1790, ch. 25, § 1, 1 Stat. 129 (extending census provisions to Rhode Island); Act of July 20, 1790, ch. 29, §§ 1, 4, 1 Stat. 131, 133 (regulation of seamen); Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137-138 (trade with Indians); Act of Mar. 3, 1791, ch. 15, § 44, 1 Stat. 195-196 (duties on liquor). See also Act of Feb. 20, 1792, ch. 7, § 25, 1 Stat. 239 (Post Office); Act of Mar. 1, 1793, ch. 29, § 12, 1 Stat. 331 (trade with Indians); Act of Mar. 22, 1794, ch. 11, §§ 2, 4, 1 Stat. 349 (slave trade) (applied in *Adams*, *qui tam* v. *Woods*, 6 U.S. (2 Cranch) 336 (1805)).

A law enacted by the Second Congress provided that "if any informer or plaintiff on a penal statute to whose benefit the penalty or any part thereof if recovered is directed by law to accrue shall discontinue his suit or prosecution or shall be nonsuit in the same, or if upon trial a verdict shall pass for the defendant, the court shall award to the defendant his costs," unless the plaintiff was an authorized federal official found by the court to have had "reasonable cause for commencing" the suit. Act of May 8, 1792, ch. 36, § 5, 1 Stat. 277-278. The Second Congress thus appeared to regard the *qui tam* mechanism as a sufficiently well-established feature of federal statutory law to warrant a provision generally governing the award of costs in such suits. The substance of that provision was reenacted in 1799 (Act of Feb. 28, 1799, ch. 19, § 8, 1 Stat. 626), and was carried forward until the 1948 revision of Title 28. See 28 U.S.C. 823 (1946).

Ins. Co., 127 U.S. 265, 297 (1888) (quoted in *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983)); accord *Bowsher* v. *Synar*, 478 U.S. 714, 723-724 (1986); cf. *Mistretta* v. *United States*, 488 U.S. 361, 401 (1988) ("traditional ways of conducting government give meaning to the Constitution") (ellipsis and internal quotation marks omitted). That is especially true where (as here) the relevant constitutional provision was not intended to establish a new framework of governance (thereby establishing a principle whose precise implications might initially be uncertain), but was instead conceived as a reaffirmation of traditional (and well-understood) notions of the appropriate judicial sphere.[4]

2. a. Chief Justice (then Representative) Marshall observed that to constitute a "Case[] in Law and Equity" within the meaning of Article III, "a question must assume a legal form for forensic litigation and judicial decision. There must be parties to come into court, who can be reached by its process, and bound by its power; whose rights admit of

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[4] Pursuant to Congress's power to "grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water" (Art. I, § 8, Cl. 11), early Congresses also authorized the President to commission private ships (privateers) to capture enemy vessels (including vessels engaged in illegal intercourse with the enemy). Under the prize statutes, the captor could bring the captured vessel into the jurisdiction of the United States and file an in rem action against the ship in federal court. If the vessel was condemned, the captor was entitled to the ship or its value. See, *e.g.*, *The Sally*, 12 U.S. (8 Cranch) 382, 384 (1814) (Story, J.); see also *The Nassau*, 71 U.S. (4 Wall.) 634, 640-642 (1866). As with *qui tam* provisions, the premise of the prize statutes was that important national purposes could be furthered by enlisting the efforts of private persons through the offer of a reward or bounty. Cf. *United States* v. *Griswold*, 24 F. 361, 366 (C.C.D. Ore. 1885) (*qui tam* suits "compare with the ordinary methods [of preventing frauds on the Treasury] as the enterprising privateer does to the slow-going public vessel") (quoted in *Hughes Aircraft*, 520 U.S. at 949). An integral feature of both regimes, moreover, was the availability of a right of action in federal court to collect the statutory reward—a right that did not depend on proof that the plaintiff had himself been injured by the unlawful conduct that formed the basis for the suit.

ultimate decision by a tribunal to which they are bound to submit." *Marshall Speech*, 18 U.S. (5 Wheat.) App. at 17. Writing for the Court in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), the Chief Justice explained that "[t]he province of the court is, solely, to decide on the rights of individuals," *id.* at 170; a federal court's power to "say what the law is" (*id.* at 177) may properly be exercised only in the course of resolving concrete disputes between actual litigants. See *ibid.* ("Those who apply the rule to particular cases, must of necessity expound and interpret that rule."). The Framers thus conceived of a "case" or "controversy" as an adversary proceeding between parties having a concrete stake in the litigation, who were subject to the court's processes and could be bound by its judgment. Accord *Muskrat*, 219 U.S. at 357 ("The term ['cases and controversies'] implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication."); *Chicago & Grand Trunk Ry.* v. *Wellman*, 143 U.S. 339, 345 (1892) (a federal court can decide only those constitutional claims raised "in pursuance of an honest and actual antagonistic assertion of rights by one individual against another").[5]

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[5] The Article III "judicial Power" to decide "Cases" has often been described by contrasting it with what it is not: *i.e.*, an overarching authority to resolve all controvertible legal *questions* irrespective of the context in which those issues are posed. John Marshall explained that

> [i]f the judicial power extended to every *question* under the constitution, it would involve almost every subject proper for legislative discussion and decision; if to every *question* under the laws and treaties of the United States, it would involve almost every subject on which the executive could act. The division of power [between the Branches] * * * could exist no longer, and the other departments would be swallowed up by the judiciary.

Marshall Speech, 18 U.S. (5 Wheat.) at App. 16. A *qui tam* suit does not raise those concerns.

Qui tam suits under the FCA satisfy those prerequisites. Adjudication of such actions requires the application of legal principles to concrete factual settings. And because a successful relator is entitled by law to a share of the government's monetary recovery, he possesses the prototypical "concrete stake" in the outcome of the litigation. The consistent willingness of the federal courts to adjudicate *qui tam* actions therefore is not an historical anomaly; use of the *qui tam* mechanism is fully consonant with the principles underlying Article III's "case or controversy" requirement.

Nor could it properly be said that a *qui tam* suit is an Article III "Case[]" or "Controvers[y]" insofar as the relator seeks money for himself, but is not a "Case[]" or "Controvers[y]" insofar as he seeks money for the government. Because the relator's award is calculated as a percentage of the government's total recovery, see 31 U.S.C. 3730(d), his stake in the litigation is inextricably tied to that of the United States. Moreover, the judgment in a *qui tam* suit is preclusive of any subsequent suit on the same cause of action, either by the United States or by another relator. See U.S. Br. 41 n.26; 31 U.S.C. 3730(b)(5). Thus, while the relator and the government share the recovery in any successful *qui tam* action, the proceeds are derived from a single, indivisible *judgment* on a single, indivisible *claim*. The proceeds of *qui tam* suits have traditionally been divided between the relator and the government; indeed, the prospect of a return to the Treasury is the core justification for the *qui tam* mechanism.

b. The tripartite test for Article III standing set forth in this Court's more recent decisions—*i.e.*, the rule that a plaintiff must (1) establish "injury in fact" that (2) is caused by the challenged actions of the defendant and (3) is redressable by a favorable judicial decision, see, *e.g.*, *Steel Co.*, 523 U.S. at 102-103—is properly understood, not as an articulation of *additional* requirements for invoking the power of an Article III court, but as an analytic framework for applying tradi-

tional jurisdictional principles to modern public law litigation. As this Court explained in *Steel Co.*, "[a]lthough [the Court] ha[s] packaged the requirements of constitutional 'case' or 'controversy' somewhat differently in the past 25 years—an era rich in three-part tests—the point has always been the same: whether a plaintiff 'personally would benefit in a tangible way from the court's intervention.'" *Id.* at 103 n.5 (quoting *Warth* v. *Seldin*, 422 U.S. 490, 508 (1975)). See also *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 573-578 (1992) (explaining that modern standing jurisprudence rests on longstanding conceptions of the proper scope of the judicial power).

When a plaintiff seeks prospective injunctive or declaratory relief, the requirement that he demonstrate injury from the challenged practice ensures that he possesses a concrete stake in the litigation: only a person who is or will be harmed by purportedly unlawful conduct can benefit from an order requiring its cessation. And because this Court's standing decisions have almost uniformly involved suits for prospective relief (typically filed against governmental entities, cf. *Steel Co.*, 523 U.S. at 103 n.5), the Court in articulating the governing legal standard has understandably equated the question of injury with the question whether the requisite adversity of interests exists. In the final analysis, however, the "injury in fact" requirement is not a freestanding constitutional command, but a means of determining whether a particular dispute is a "Case[]" or "Controvers[y]" within the meaning of Article III. The requirement therefore should not be applied in a manner that would preclude the federal courts from hearing "the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the Government's benefit, by providing a cash bounty for the victorious plaintiff," *Defenders of Wildlife*, 504 U.S. at 572-573—a category of suits that was well known to the Framers, commonly understood to fall within the scope of the "judicial Power," and adopted by the

First Congress as an important means of vindicating the interests of the United States.[6]

c. An unduly rigid application of the "injury in fact" requirement would have disruptive consequences extending beyond the nullification of Congress's judgment regarding the appropriate means of redressing fraud against the government. As our principal brief explains (at 41), the general rule is that "claims or choses in action may be freely transferred or assigned to others." *Advanced Magnetics, Inc.* v. *Bayfront Partners, Inc.*, 106 F.3d 11, 17 (2d Cir. 1997). In *Spiller* v. *Atchison, Topeka & Santa Fe Ry.*, 253 U.S. 117 (1920), shippers assigned to a plaintiff their claims for reparations for excessive charges made for interstate transport of their goods. The defendant carriers contended that the claims were not assignable; their argument was based upon the fact that the Interstate Commerce Act made carriers who violated it "liable to the person or persons injured thereby." *Id.* at 134-135 (quoting § 8, 24 Stat. 382). In rejecting that contention, this Court held that

> [a] claim for damages sustained through the exaction of unreasonable charges for the carriage of freight is a claim not for a penalty but for compensation, is a pro-

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[6] *Diamond* v. *Charles*, 476 U.S. 54 (1986), is not to the contrary. In *Diamond*, the Court held that an intervenor-defendant's potential liability for attorneys' fees did not give him standing to appeal from an unfavorable court of appeals decision. *Id.* at 69-71. That holding rested on the fact that "[t]he fee award [wa]s wholly unrelated to the subject matter of the litigation" and was "only a byproduct of the suit itself." *Id.* at 70-71; see also *id.* at 77 (O'Connor, J., concurring in part and concurring in the judgment) ("an award of attorney's fees is uniquely separable from the cause of action on the merits") (internal quotation marks omitted); *Steel Co.*, 523 U.S. at 107 (in order to satisfy Article III, "[t]he litigation must give the plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself."). By contrast, the damages and penalties awarded in a successful *qui tam* action (of which the relator is entitled by law to recover a share) are not a "byproduct" of the suit: they are the very subject of the litigation.

> perty right assignable in its nature, and must be regarded as assignable at law, in the absence of a legislative intent to the contrary.

253 U.S. at 135 (citations omitted). See, *e.g.*, *Titus* v. *Wallick*, 306 U.S. 282, 288-289 (1939).

For Article III purposes, it is irrelevant whether Congress conceived of the *qui tam* provisions as "assignments" when it passed or amended the FCA, or whether those provisions conform to all of the statutory or judge-made rules that govern the assignability of choses in action in various jurisdictions. The significant point for present purposes is that cases involving the assignment of claims demonstrate that federal courts can and do validly adjudicate suits in which a plaintiff has not personally been injured by a defendant's primary conduct, but has nevertheless acquired an adequate concrete stake in the litigation through the acquisition of rights from a person who *has* suffered injury.[7] Q*ui tam* suits reflect the same constitutional principle.

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For the reasons stated above, and in our principal brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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NOVEMBER 1999

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[7] So-called "survival statutes," see *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 575 n.2 (1974), reflect a similar principle. Unlike a wrongful death statute, which creates a new cause of action to redress the harms suffered by survivors as a result of the victim's death, see *ibid.*, "the survival statute merely *continues* in existence the injured person's claim after death as an asset of his estate." 3 Stuart M. Speiser, et al., *Wrongful Death and Injury* § 14:1, at 3 (3d ed. 1992). As with the assignment of a chose in action, the purpose and effect of survival statutes is to authorize one person to sue to redress injuries done to another, based on a conferral of rights effected in a manner specified by law.